IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 6069 of 1985

For Approval and Signature:

Hon'ble MR.JUSTICE J.N.BHATT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

RABARI BHUDABHAI DHULABHAI

Versus

STATE OF GUJARAT

Appearance:

MR DK ACHARYA for Petitioner

MR.K.C.SHAH,ASSTT.GOVT.PLEADER for Respondent No. 1

MR SV RAJU for Respondent No. 2

CORAM : MR.JUSTICE J.N.BHATT

Date of decision: 31/07/96

ORAL JUDGEMENT

The intepretation and applicability of the provisions of sections 61 and 79A of the Bombay Land Revenue Code,1879 ('BLR Code' for short) and Rules 37 and 38 of the Gujarat Land Revenue Rules, 1972 ('the Rules' for short) are the main questions which have come up for consideration and

adjudication in this petition under Articles 226 and 227 of the Constitutiion of India.

The petitioner was cultivating land bearing survey number 50 admeasuring 2 acres- l2 gunthas on yearly basis (EKSALI)of village Punia of Palanpur Taluka ('the disputed land' for short) since more than two decades which came to be granted to him by the Assistant Collector,Palanpur by his order dated l3.8.1968 on new and impartible tenure on payment of occupancy price on condition of doing personal cultivation. The disputed land came to be mutated in the name of the petitioner in the record of rights under Entry 235 on 23.5.1976 and it was also certified on l5.9.1976.The case of the petitioner is that he has been in occupation and possession of the disputed land upto 1982-83.

The Deputy Collector in an inquiry by his order dated l2.7.1982 cancelled the grant and,forfeited the disputed land to Government holding that there was breach of condition to personally cultivate the same by the petitioner. The Deputy Collector after hearing the petitioner and respondent No.2 reached the conclusion that the condition to personally cultivate the land was breached as respondent No.2 Puna Bhera was in possession. Therefore,cancellation of grant and forfeiture of the disputed land followed.

The petitioner challenged the order of the Deputy Collector by filing appeal No.155 of 1983 under section 203 of the BLR Code before the Collector Banaskantha at Palanpur which came to be dismissed ,confirming the order of the Deputy Collector, on 3l.3.1984. The petitiioner carried the matter in revision No. 711 of 1984 under section 211 of the BLR Code which also came to be dismissed on 11.10.1984. Hence,this petition under Articles 226 and 227 of the Constitution of India,at the instance of the petitioner.

The impugned order of the Deputy Collector dated l2.7.1982 is confirmed by the appellate and revisional authorities. Thus, all the three authorities below have taken a consistent and concurrent view that there was breach of condition No.3 in the order of grant and transfer of land to respondent No.2. Ordinarily, such a finding of fact concurrently and consistently recorded by the authorities below would not be a proper subject matter for interference in a petition under Articles 226 and 227 of the Constitution of India. No doubt, it is true that powers and scope of the writ court are very much circumscribed. Ordinarily, the writ court will be

at lothe to interfere with the findings of the authorities below unless there is a manifest error, misreading of evidence, non-application of mind ,perversity resulting into miscarriage of justice and so on and so forth.Precisely, here is a case wherein the impugned finding recorded by the Deputy Collector and confirmed by the appellate and revisional authorities is suffering from the vice of perversity and misreading of evidence on record and non-application of mind to the vital provisions of law applicable to the present case which can very well be visualised and highlighted hereafter.

The aforesaid finding of the three authorities below is based only on the fact that there was an entry in the revenue record for 1978/79 in the name of respondent No.2 in place of the petitioner who was granted the lease with conditions. The same is also tainted with misreading of evidence and non-application of mind to the relevant provisions of the BLR Code. Therefore, the entry in 1978/79 in respect of the disputed land in the name of respondent no.2 Puna Bhera and the resultant position is treated as breach of condition No.3 in the order of grant of the disputed land in favour of the petitioner. This finding is not only erroneous but is illegal . The case of the petitioner is that respondent no.2 has occupied the disputed land and a civil suit between the parties was pending.If a trespasser or a stranger remains for a while in possession in respect of the disputed land, which has no nexus with the transaction with the petitioner-grantee of the land,could it be said ipso facto sufficient so as to hold that there was breach of condition no.3 in the order of grant of land ? The obvious answer would be in the negative. Breach of condition no.3 could be proved by evidence. There may be a breach,but the authority below viz. the Deputy Collector simply reached the conclusion that there is breach of condition no. 3 only because somebody else is in possession and there was entry in the name of respondent no.2 for the year l978/79. This is precisely disputed by the parties. Therefore,this finding of fact recorded by the Deputy Collector in the impugned order and confirmed by the appellate authority as also the revisional authority is manifestly perverse and patently erroneous.

Under rule 37(4), the petitioner came to be granted land in the prescribed agreement in form No.I-1 under rule 37(4) of the Rules. There is a prescribed form in which agreement is required to be passed by a person intending

to become occupant of land on inalienable and impartible tenure.

Rule 37 makes provisions for grant of land for agricultural purpose on certain conditions. The said rule reads as under :

"37. (l) Any unoccupied survey number not assigned for any special purpose may,at the Collector's discretion, be granted for agricultural purposes to such person as the Collector deems fit,either upon payment of a price fixed by the Collector,or without charge,or may be put up to public auction and sold subject to his confirmation to the highest bidder.

(2) In the case of such grants an agreement in form F shall ordinarily be taken from the person intending to become the occupant.

(3) When the land is granted on inalienable tenure the clause specified in form I shall be added to the agreement.

(4) When the land is granted on impartible tenure an agreement inform F(l) shall ordinarily be taken from the person intending to be become the occupant.

(5) The declaration below the agreement shall be subscribed by atleast one respectable witness and by the patel and village accountant of the village in which the land is situate".

It could very well be seen from sub-rule (4) of rule 37 of the Rules that when the land is granted on impartible and inalienable tenure, an agreement is required to be executed in form IA by the person intending to become an occupant. Accordingly, an agreement was executed by the petitioner. One of the conditions viz.condition No.3 is to the effect that the occupant personally shall cultivate the land granted. After the grant of land in the aforesaid agreement form, on the permanent basis, revenue entry 235 came to be recorded in the record of rights on 23.5.1976. The said entry in the name of the petitioner came to be changed and mutated in the name of respondent no.2 Puna Bhera in 1978/79. This change in the entry and position by respondent no.2 is taken and treated by the authorities below as breach of condition No.3 which is totally not only unjust,, erroneous but is illegal. The three authorities below have failed to bear

in mind that the mutation entry in the year 1978/79 in the name of respondent no.2 in respect of the disputed land vice the petitioner is itself illegal. being in violation of the mandatory provisions of BLR Code and the rules thereunder.

It must also be mentioned that revenue record right from 1955-56 upto 1982-83 produced in the petition which is not disputed, unequivocally goes to show that the name of the petitioner is shown as a cultivator except for the year 1978/79. Even in 1980/81, name of the petitioner is shown in the revenue record. The entire documentary evidence is overlooked by the authorities below. Reliance is placed only on entry made in the year 1978/79 while passing the impugned order. This change of entry which is not legally made should not have been relied on or the purpose of cancellation of grant and for forfeiture of the land to the Government, firstly because the entry is recorded in violation of the mandatory provisions of the BLR Code and the rules thereunder , and secondly because, the entry and the resultant occupation of respondent no.2 in respect of the disputed land ipso facto wouldn't tantamount to transfer of land by the petitioner to respondent no.2. There is a serious dispute between the petitioner and respondent no.2 about possession. A civil suit is pending between them wherein the Government is also a party. Therefore, it could not have been taken and treated as transfer of land by the petitioner to respondent no.2 which is the basis of the impugned order. Thus, the whole basis goes off and the resultant effect is that the entire impugned order falls to the ground.

There is no dispute about the fact that the entry in the name of respondent no.2 in 1978/79 in respect of the disputed land is a pencil entry which is obviously not certified one. There is no dispute about this aspect.Apart from that, provisions of section 135 D of the BLR Code and rules 106 and 107 are not complied with.The procedure is prescribed for making a mutation by way of entry in the record of rights which is not followed while making entry in the name of respondent no.2 in the year 1978/79 in respect of the disputed land. Section 135 D prescribes the procedure for maintaining register of mutations and register of disputed cases. It would be profitable to refer to the said provisions at this stage. Section 135 D reads as under :

"135 D (l) The village Accountant shall enter in a register of mutation every report made to him under S. l35C or any intimation of acquisition

or transfer of any right of the kind mentioned in section 135C received from the Mamlatdar or a court of law.

(2) Whenever a village accountant makes an entry in the register of mutations he shall at the same time post up a complete copy of the entry in a conspicuous place in the chavdi, and shall give written intimation to all persons appearing from the record of rights or register of mutations to be interested in the mutation, and to any other person whom he has reason to believe to be interested therein.

(3) Should any objection to any entry made under sub-section (l) in the register of mutations be made in writing to the village accountant,it shall be the duty of the village accountant to enter theparticuars of subjection in a register of disputed cases and to give a written acknowledgment of the receipt of such objection to the person making it.

(4) Orders disposing of objections entered in the register of disputed cases shall be recorded in the register of mutations by such officers and in such manner as may be prescribed by rules made by the State Government in this behalf.

(5) The transfer of entries from the register of mutations to the record of rights shall be effected subject tosuch rules as may be made by the State Government in this behalf:

Provided that an entry in the register of mutations shall not be transferred to the record of rights until such entry has been duly certified.

(6) Entries in register of mutations how to be certified- Entries in the register of mutations shall be tested and if found correct or after correction,as the case may be, shall be certified by a revenue officer of rank not lower than that of a Mamlatdar's first Karkun.

(7) The provisions of this section shall apply in respect of perpetual tenancies and also in respect of any tenancies mentioned in a notification under sub section (2)of section 135-B but the provisions of this section shall

not apply in respect of other tenancies,which shall be entered in a register of tenancies,in such manner and under such procedure as the State Government may prescribe by rules made in this behalf".

It could very well beseen from the aforesaid provisions that prescribed procedure has to be followed for making entry in the register of mutations and register of disputed cases. No procedure is followed while making entry in the nameof respondent no.2 in the year 1978/79 in respect of the disputed land. It is the case of the petitioner that respondent No.2 is a trespasser and he has taken over possession of the disputed land illegally. When the pencil entry was made which came to be relied on by the authorities below, it was incumbent upon the authorities to focus their attention to the relevant provisions and the dispute between the parties.Entries in the register of mutations are to be tested and if found correct or after correction, shall be certified by a revenue officer or rank not lower than that of a Mamlatdar's first Karkun.That procedure does not seem to have been followed. The pencil entry remained a pencil entry and it does not seem to have been certified.Again,in the next year 1978/79, the pencil entry was given go-bye and the name of the petitioner came to be entered in respect of the disputed land.

Relevant provisions in the rules are made in Chapter XV pertaining to record of rights in Rules.As per the provisions of rule 107,entries in the diary of mutations shall be further tested and revised by a revenue officer not lower in rank than Mamlatdar's First Karkun and if it is found correct,it shall be certified by him. If the entry is found to be incorrect, if no dispute is brought to his notice,then it can be corrected as in Rule 106(4) and certified by him and such correction shall be a new mutation for the purpose of section 135 D(2). Therefore,the required procedure of Se 2,4-D for making entry in the record of rights village form 7,12 has not been fulfilled and satisfied. This aspect is also not considered by the authorities below which has also resulted into miscarriage of justice.

The impugned order of the Deputy Collector cancelling the grant and forfeiting the land in dispute to the Government appears to have been passed in purported exercise of power under section 61 of the BLR Code. Section 61 prescribes penalty for unauthorised occupation of land. It applies in terms to a person who has ceased to be entitled or occupant of Government land and who

thereafter continues to be in occupation thereof. Section 61 reads as under :

"61. Any person who shall unauthrisedly enter upon occupation of any land set apart for any special purpose,or any unoccupied land which has not been alienated,and any person who uses or occupies any such land to the use or occupation of which by reason of any of the provisions of this Act, he is not entitled or has ceased to be entitled shall,

if the land which he unauthorisedly occupies forms part of an assessed survey number,pay the assessment of the entire number for the whole period of his unauthorised occupation, and

if the land sooccupied by him has not been assessed, such amount of assessment as would be leviable for the said period in the same village on the same extent of similar land used for the same purpose; and shall also be liable ,at the discretion of the Collector,to a fine not exceeding five rupees,or a sum equal to ten times the amount of assessment payable by him for one year,if such sum be in excess of five rupees, if he has taken up the land for purposes of cultivation,and not exceeding such limit as may be fixed in rules made in this behalf under section 2l4, if he has used it for any non-agricultural purpose.

The Collector's decision as to the amount of assessment payable for the land unauthorisedly occupied shall be conclusive, and in determining its amount occupation for a portion of a year shall be counted as for a whole year.

The person unauthorisedly occupying any such land may be summarily evicted by the Collector, and any crop raised in the land shall be liable to forfeiture,and any building, or other construction,erected threreon shall also,if not removed by him after such written notice as the Collector may deem reasonable,be liable to forfeiture, or to summary removal.

Forfeiture under this section shall be adjudged by the Collector and any property so forfeited shall be disposed of as the Collector may direct and the cost of the removal of any encroachment

under this section shall be recoverable as an arrear of land revenue."

It could very well be seen from the aforesaid provisions that besides recovery of fine and assessment,the Collector is entrusted with the power of eviction and forfeiture expressed in the words 'the person unauthorisedly occupying any such land may be summarily evicted by theCollector,and any crop raised in the land shall be liable to forfeiture It is a discretion left to the Collector or an officer exercising powers for the Collector. Power under section 6l can be exercised provided there is unauthorised occupation at the instance of any land or authorised occupant has ceased or a person has ceased to be entitled to the land. The dispute is that his authorised occupation became unauthorised or in other words, he has ceased to be become authroised occupant on his committing breach ofcondition no. 3 by transferring land to respondent no.2.After having examined the scheme of section 61, it appears that occupant is primarily accountable for unauthorised use of land by himself or by a person holding through him. The Collector is also given power for summary eviction of such person.Section 6l does not create any liability for action for the act of trespasser.If provisions of section 6l are construed in the same manner in which the authorities below have construed, it would mean that the authorities are entrusted with power to evict occupant from his occupation of land for the acts of trespasser for which he himself is deeply aggrieved.Such could not have been the purport and design of the legislature. It cannot be read in the provisions of section 61 that the legislature has provided that the occupant will also be accountable for the acts of trespasser. Power under section 6l for imposition of penalties or forfeiture of land to Government cannot be exercised on the strength of pencil entry which is not only not certified but is made in violation of the principles of natural justice and the provisions of section 135 D read with Rules 106 and 107. It is,therefore ,incumbent upon the respondent authorities to first ascertain when authorised possession or occupation of the petitioner had ceased and he became unauthorised disentitling him of his for possession. That can be done only in the event of breach of condition no.3, as alleged. There is no evidence worth the candle which will go to suggest that there was any breach of condition no.3.Condition No.3 is that the petitioner should personally cultivate agricultural land granted to him. It is the case of the petitioner that he has been cultivating the land personally since 1955-56 much prior

to the date of grant of land on EKSALI basis. He was granted permanently the disputed land by the respondent-authority by virtue of grant of land which came to be recorded on l3.8.1968. So, the order of grant of land came to be passed on l3.8.1968. One of the conditions of grant was that the petitioner should personally cultivate the land.It was,therefore,incumbent upon the authorities to show that there was breach of condition and personal cultivation has ceased culminating into unauthorised occupation of the land or cessation of entitlement of the right. This appears to have been only ' assumed and presumed' by the respondent authorities only on the basis of pencil entry recorded in the year l978/79 in form No. 7 and 12. Could it be conceived even for a moment from the situation as in the present case by a reasonable man of prudence that there was transfer and that too an effective transfer of land in violation of condition no.3 to respondent no.2 between whom civil fight is going on ? The obvious answer would be in the negative.This aspect is unfortunately lost sight of due to non-application of mind and resulting into miscarriage of justice. Therefore, it is incumbent upon this court while exercising extra-ordinary,discretionary,prerogative writ jurisdiction ,.to put such illegal order in a legal shape by quashing and setting it aside. There is no manner of doubt that the impugned order recorded by the Deputy Collector cancelling grant of land and resultant forfeiture to Government recorded on l2.7.1982 by him which came to be confirmed in appeal on 3l.3.1984 and later on in revision on 11.10.1984,is manifestly illegal. Therefore, the orders passed by the respondent authorities are quashed and set aside and the petition is required to be allowed.

It may be noted that a dispute is going on in the civil court between the parties in respect of the disputed land.By way of parting thought, it may be cautioned that the suit will have to be adjudicated upon on merits after a full-fledged trial in view of the evidence that may be led before the court, uninfluenced by the observations made by the authorities below in the impugned orders and also the observations made by this court hereinbefore, as they are for the purpose of deciding the merits of this petition. In other words, the decision that may be rendered by the civil court shall be uninfluenced by the observations and remarks made in this judgment.It would be open to the civil court to decide and adjudicate upon the the suit on its merits. It is clarified that it would be open for the appropriate revenue authority to pursue statutory provisions of section 79A of the BLR

Code for removal of unauthorised occupation.

In view of the aforesaid facts and circumstances,, the petition is allowed. Rule is made absolute to the aforesaid extent.There shall be no order as to costs.

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Corrected